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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 970

BINKLEY MINING COMPANY OF MISSOURI,
Petitioner,

vs.

DAN H. WHEELER, Acting Director Bituminous Coal Division, Department of the Interior, HAROLD L. ICKES, Secretary of the Interior.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Henry Adamson,
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DAN H. WHEELER, ACTING DIRECTOR BITUMINOUS COAL DIVISION, DEPARTMENT OF THE INTERIOR, HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner herein respectfully presents to this court its petition for Writ of Certiorari, as follows:

Jurisdiction.

1. Jurisdiction in this cause is based upon Judicial Code, section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A. Title 28, section 347) and upon sec-

tion 6 (b) 50 Stat. 85 (Title 15, U. S. C. A. section 836, paragraph b) of the Bituminous Coal Act of 1937.

2. The date of the original judgment to be reviewed is February 10, 1943 (R. 152). Petition for rehearing was filed February 25, 1943 (R. 177) within the time for filing petitions for rehearing provided by the rules of the United States Circuit Court of Appeals, Eighth Circuit, and was denied March 5, 1943 (R. 179).

Summary Statement of Matter Involved.

This cause presents fundamental questions with reference to the powers and duties of the Bituminous Coal Division, Department of the Interior, in the daily administration of the coal code set up by the Bituminous Coal Act of 1937, approved April 26, 1937, 50 Stat. 72-90 (15 U. S. C. A. 828-851) and challenges, as being inconsistent with the manifest intent of the Act, the basic theory of administration of the code adopted and carried out by the Bituminous Coal Division in its daily administration of the code. (Sections 4-II(e), 4-II(j), 5(b) and 6(a) of the Bituminous Coal Act of 1937, being the sections involved in this cause, are printed in full in appendix hereto).

The Bituminous Coal Act of 1937 is cast in a form entirely new and different from any other regulatory statute theretofore enacted, sets up a voluntary code applicable to coal producers accepting the code and to none other; was not intended as a rigid regulatory act, and provides methods of requiring compliance by coal producers who accept the code. Section 4 of the Act sets up the code and section 4-II(j) grants certain specified persons and entities the right to require compliance with the code by filing written complaint of a violation with the Bituminous Coal Division. Section 5(a) makes provision for accepting the code and section 5(b) provides for revocation of code mem-

bership or issuance of cease and desist order upon written complaint of *wilful violation* filed by specified persons or entities and after hearing.

June 12, 1941, the Secretary of the Bituminous Coal Producers Board for District 15, one of the entities qualified under the specific provisions of the Act to file complaint, upon information furnished by the Bituminous Coal Division, filed written complaint with the Bituminous Coal Division charging Petitioner with "wilful violation" of the code prices and praying revocation of Petitioner's code membership or, in the alternative, issuance of cease and desist order (R. 10-14). Petitioner filed answer (R. 18-19); complainant filed written request for withdrawal of complaint, which was denied (R. 19-25); complainant and petitioner filed joint stipulation of dismissal, which was denied (R. 26); hearing before Examiner of Bituminous Coal Division. Complainant introduced in evidence certified copy of District Board 15's resolution directing withdrawal of complaint and rested (R. 27-35). Bituminous Coal Division, over the objection of Petitioner, was permitted to prosecute complaint and introduce evidence (R. 35-39). Motion to strike all evidence introduced by the Bituminous Coal Division was made at the conclusion of the hearing and overruled (R. 115). Examiner made report, so-called findings and recommendations, finding petitioner guilty of wilful violation of the code (R. 116-123). Petitioner filed exceptions to Examiner's report contending that complainant had absolute right to withdraw complaint; that complainant had the absolute right to stipulate for dismissal of complaint; that the Coal Division had no authority to introduce evidence and be heard at the hearing; that there was a total lack of findings sufficient to sustain the recommendations; that the evidence was insufficient to sustain a finding of wilful violation and request oral argument on the excep-

tions (R. 127-131). Director of the Bituminous Coal Division, on June 4, 1942, denied request for oral argument, overruled exceptions of Petitioner, adopted recommendations of the Examiner and ordered the Petitioner to cease and desist and be permanently enjoined and restrained from selling coal at less than applicable effective minimum prices (R. 140-148). Examiner and Director of the Bituminous Coal Division throughout the proceedings have erroneously referred to the complaint as filed "pursuant to the provisions of section 4-II(j) and 5(b) of the Bituminous Coal Act of 1937" (R. 116 and 140), and apparently made their decision upon the theory that section 4-II(j) and 5(b) of the Act cover the same subject matter and authorize revocation of the code membership or the issuance of cease and desist order for mere violation. Petitioner on July 16, 1942, filed its petition to review the order of the Bituminous Coal Division in the United States Circuit Court of Appeals for the Eighth Circuit, and on February 10, 1943, the Circuit Court of Appeals for the Eighth Circuit rendered its opinion and decision affirming the action of the Bituminous Coal Division, and in its opinion and decision held:

1. That the complaint filed by the Bituminous Coal Producers Board for District 15 was a public proceedings and not a private proceedings (R. 164-165).

2. That it was within the discretion of the Division to cause the proof to be offered and have the matter proceeded with (R. 166).

3. That "wilful violation" as used in section 5(b) of the Act "Was designed to describe the attitude of a code member skilled in the coal selling art and familiar with its practice, who having the free will and choice, intentionally and knowingly either omits to do what is required of him in

disregard of the code provisions or acts affirmatively with manifest indifference to its requirements," and further held that "under the circumstances, inquiry becomes a duty, and he may reasonably be charged with the knowledge he would have obtained had the required inquiry been made" (R. 168).

4. That both the Examiner and the Director should be criticized for their disorderliness in not making explicit findings of the evidentiary facts (R. 169).

On February 25, 1943, Petitioner herein filed its Petition for Rehearing, which said petition was, on March 5, 1943, denied by the United States Circuit Court of Appeals for the Eighth Circuit (R. 179).

Evidence.

The facts are undisputed and disclose the following:

Petitioner is a code member operating a mine in the State of Missouri, producing on an average of approximately 300,000 tons of coal per year (R. 96). Coal produced by Petitioner is shipped to numerous marketing areas and each marketing area has a different price on each size and for different sizes (R. 97). The industrial use rule was in effect and applies "where the coal moves directly from the mine of the producer to the consumer using the fuel principally for (1) the purpose of driving steam engines or turbines (2) the purpose of manufacturing or processing if fuel is required each day of the year products of the consumer are produced" (R. 122). The Western Tablet and Stationery Company operates a plant at St. Joseph, Missouri, for the manufacture of school tablets, writing tablets, loose leaf fillers, school binders, stationery, envelopes, notebooks, stenographers' notebooks and other items, employing from 700 to 850 employees; power plant at the Western

Tablet and Stationery Company consists of two big 236 H.P. Sterling boilers (R. 43-66, R. 73-80, R. 82). Defendant, Binkley Mining Company of Missouri, through its subsales agent, made contract for sale of coal to the Western Tablet and Stationery Company for the period covering April 1, 1940, to March 31, 1941, at $1.63 per ton (R. 51). Coal produced by the defendant, Binkley Mining Company of Missouri, was sold by Southwest Coal Company as its agent, and Binkley Coal Company as sub-agents of the Southwest Coal Company (R. 92). Prior to fixing of prices by Coal Division, October 1, 1940, and under similar classification between industrial and space heating differential, defendant followed an established practice of selling coal to the Western Tablet and Stationery Company on an industrial basis and not on a space heating basis (R. 87 and 93). Western Tablet and Stationery Company consumes coal at least six months out of the year solely for the purpose of processing, and six months out of the year it was used for both processing and heating purposes (R. 67-78, 76 and 113). Coal is used for generating steam for processing purposes every day the plant runs and about three tons per day are consumed for processing purposes every day the plant runs (R. 67, 79). Total amount of coal used during calendar year for processing and heating is around 2,000 tons, and plant runs on an average of about 325 days a year (R. 79). Price fixing by the Coal Division went into effect October 1, 1940, and copy of contract with Western Tablet and Stationery Company was filed with the Statistical Bureau of the Coal Division (R. 95); that industrial prices fixed by the Coal Division were fixed at $1.63 per ton for the class and kind of coal used by Western Tablet and Stationery Company or at the same price as prevailed prior to the fixing of prices (R. 66). Sales agent and officials of defendant had no knowledge or information that the coal sold to Western Tablet and Stationery Company should

take space heating price during the life of existing contract, and had no knowledge that it had been classified as a space heating plant until they renewed the contract on the same basis as the old contract, about April 1, 1941, when new, signed contract was sent to the Southwest Coal Company and the defendant was notified by Southwest Coal Company that Western Tablet and Stationery Company plant had been classified as a space heating plant (R. 95-96); that the then proposed contract at industrial prices was canceled and new contract was made at space heating prices and filed with the Statistical Bureau (R. 95-96); that under similar classification, prior to code prices, Southwest Coal Company classified Western Tablet and Stationery plant as an industrial plant, and sales agent still thinks it is an industrial plant (R. 93). Sales agent of defendant has instructed all salesmen to comply with the law in every respect (R. 96), and defendant had no intention of violating any price fixed or any rule or regulation (R. 96).

Questions Presented.

1. Was it the intent of Congress, in the passage of the Bituminous Coal Act of 1937, to set up a voluntary code to be administered as a corrective and cooperative measure by the coal industry itself under the supervision of a governmental agency, or was it the intent of Congress to set up a rigid, highly penal, regulatory measure to be enforced by the Coal Division of its own motion?

2. Does the Act confer upon the Division the authority to make investigation of either violations or wilful violations and, upon its own motion, institute enforcement proceedings under the Act?

3. Does the method provided by section 5(b) of the Act for requiring compliance with the code establish a proceedings public or private in its nature?

4. Is the Division authorized, upon written complaint charging wilful violation filed by one of the complainants specifically authorized to file complaint by section 5(b) of the Act (no other party specifically authorized by the Act to present evidence and be heard having intervened or become a party) to, in its own name and behalf, prosecute, hear and determine the complaint, notwithstanding the filing of a request by the sole complainant to withdraw the complaint and notwithstanding the joint motion of the complainant and defendant to dismiss complaint, or is the Division, by the terms of the Act itself, limited to hearing and determining?

5. Does the power delegated by section 5(b) of the Act to the Division to revoke membership in the code or issue cease and desist order upon proof that such member has "wilfully violated" any provision of the code or any regulation made thereunder confer upon the Division power to revoke code membership or issue cease and desist order in any case other than where the violation was proven to be with knowledge, intentional and deliberate?

6. Does the so-called opinion of the Director contain findings to support a decision of wilful violation?

7. Is there any substantial evidence in the record to sustain the Director's findings of wilful violation?

Reasons Why Petition Should Be Granted.

This cause presents to this Court, for the first time, fundamental matters of both substance and procedure in connection with the administration of the Bituminous Coal Act of 1937:

1. Questions presented require a consideration of the whole scheme of regulation as set forth in the Bituminous Coal Act of 1937. The Bituminous Coal Code, while of a

regulatory nature, is set up in the Act as a purely voluntary code and the scheme of regulation set forth in the Act is entirely different from any scheme of regulation heretofore attempted. While there is no specific general grant of power to the Division to investigate and enforce the provisions of the Act against code members, the Bituminous Coal Division has apparently inferred from the Act that it has been granted such general powers and has proceeded to administer the Act accordingly. The Board has set up machinery for investigation and has insisted upon a rigid and scrupulous compliance with the code provisions; has apparently acted upon the theory that the voluntary code is a highly penal, regulatory act. The Attorney General's Committee of Administrative Procedure in Monograph No. 23, Vol. 1, in note 5 on page 2, in referring to the Bituminous Coal Act, makes the following statement:

> "It is worth noting that the statute is more an example of federal assistance than of federal regulation."

The Petitioner contended before the Bituminous Coal Division and in the Circuit Court of Appeals for the Eighth Circuit, and now contends that the code set up is cooperative and corrective and not penal; that the history of the enactment and the intent of the Act itself is that the stabilization of the coal industry shall be accomplished by the coal industry itself under the supervision of governmental agency and that the code should be administered in a cooperative and corrective manner and not as a highly penal regulation; that the Bituminous Coal Division is exercising powers not delegated to it by the Act, either directly or inferentially. This presents to this Court not alone question of extent of power of enforcement delegated by the Act to the Bituminous Coal Division, but also the question of whether or not the code, as adopted, is being administered in the spirit in which it was written and with the

intent manifest from the language of the Act, directly affects every code member and directly affects every action taken by the Bituminous Coal Division in the administration of the code provisions of the Act. To borrow an expression from a recent opinion of this Court, "The question presented looms large in the administration of the Act."

2. Cause also presents question of the extent of the powers delegated to the Bituminous Coal Division, of its own motion, to require compliance with the code by code members. Section 5 (b) of the Act specifically authorizes any code member or district board or any state or political subdivision of a state or the Consumers Counsel to file written complaint of wilful violations of the provisions or the regulations adopted thereunder, specifically provides that at any hearing on the complaint any code member or district board or any state or political subdivision of a state or the Consumers Counsel or any consumer or employee and the Commissioner of Internal Revenue shall be entitled to present evidence and be heard. Notwithstanding the above specific provisions, the Bituminous Coal Division has, without becoming a party to the proceeding and in the face of the complainant's request to withdraw the complaint, exercised the authority to, in its own name and behalf, introduce evidence and prosecute the complaint and proceed with the determination of whether or not a wilful violation has been committed. The Circuit Court of Appeals for the Eighth Circuit affirmed this action apparently upon the theory that the complaint was public and not private and comes within the provisions of section 6 (a) of the Act. It is the contention of the Petitioner that the complaint was individual and private; that complainant was exercising a discretionary personal right given it by the Act; that the complainant did not represent the public or any public

interest and that complainant had a right to control the litigation and withdraw or dismiss the proceedings at any time prior to judgment. It is fundamental in our system of government that administrative agencies should exercise only such powers as are delegated to them. It is important in the administration of this Act that the question of whether or not the Bituminous Coal Division has, by the Act, been granted this broad authority to prosecute, hear and determine be authoritatively settled by this court. Authoritative settlement of this question is essential to the proper administration of the Act and is essential in order that the District Boards and other persons and entities engaged in the administration of the Code set up by the Act may know and properly perform the functions delegated to them under the terms of the Act.

3. An authoritative determination of the meaning of the words "wilful violation" in section 5 (b) of the Act is essential to the orderly functioning of the code governing the marketing of the millions of tons of coal produced by the code members. Code members are entitled to know with certainty when they may be subject to the harsh expedient of revocation or cease and desist order. The Bituminous Coal Act of 1937 by section 4-II (j) provides a method for enforcing the obligation of compliance by a code member where *violation* is charged, and section 5 (b) provides a method for enforcing compliance wherein *wilful violation* is charged. Under the construction given the Act by the Director of the Bituminous Coal Division in this cause and affirmed by the Circuit Court of Appeals for the Eighth Circuit, to all practical intents and purposes any violation becomes a "wilful violation". The Act in none of its provisions provides a penalty, as a penalty. The Bituminous Coal Division, however, have by their construction converted the revocation and cease and desist provision of

section 5 (b) of the Act into a method of assessing penalties where none were provided and none were intended. This method of penalizing has become an integral part of the Bituminous Coal Division's administration of the Act and is used almost daily. Surely the question of whether or not such a construction of the Act is within the terms and within the intent of Congress is of vital importance to every code member and should be authoritatively decided by this court.

4. The best that can be said of the evidence in this case is that it shows a violation of the price provisions of the code by reason of an honest mistake. Conviction of wilful violation of the code under the provisions of the Act could not be bottomed upon such evidence. The question of the meaning of the term "wilful violation" in the Act has never been presented to nor determined by this Court. The records of the Bituminous Coal Division disclose that hundreds of charges of wilful violation have been filed with the Board. Orderly administration of the Act requires an authoritative determination of the meaning of the word "wilful" as used in section 5 (b) of the Bituminous Coal Act of 1937.

5. There are no findings of fact by the Director but he does file a written opinion which consists of argument and interspersed therein are portions in which he makes findings, and the Circuit Court of Appeals for the Eighth Circuit, in its opinion, says that both the report of the Examiner and the opinion of the Director should be criticized for their disorderliness in that both have failed in several instances to follow up their discussion of evidence with explicit findings of the evidentiary facts deduced from such evidence. The Act requires a finding of facts and these should be required in order that this court might know the

ultimate facts upon which this cause was decided by the Director.

Florida v. *United States*, 282 U. S. 194.
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.
United States v. *Shoshone Tribe*, 304 U. S. 111.

6. The importance of reviewing the questions presented would seem manifest from the fact that in addition to other questions of importance hereinabove set out, the entire theory of the administration of the Bituminous Coal Code by the administrative authority set up under the Act is properly challenged in this cause.

Wherefore, it is respectfully submitted that this petition should be granted and that this court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and, upon final consideration, reverse said cause.

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